DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS: 07-0215
Gross Retail Tax
For 2004 and 2005

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. **Vehicle Sales** – Gross Retail Tax.

Authority: IC § 6-2.5-5-15 (*Repealed by P.L.81-2004, SEC.60*); *Subaru-Isuzu Auto., Inc. v. Ind. Dep't of State Revenue,* 782 N.E.2d 1071 (Ind. Tax Ct. 2003); *Hutchison v. State Bd. of Tax Comm'rs*¸520 N.E.2d 1281 (Ind. Tax Ct. 1988); 45 IAC 2.2-5-21; Commissioner's Directive 25 (July 2004).

Taxpayer disagrees with the Department of Revenue's decision that it should have collected gross retail (sales) tax on the sale of vehicles which were subsequently transported out-of-state.

STATEMENT OF FACTS

Taxpayer is an Indiana dealer of used trucks. Taxpayer sells trucks to Indiana customers and out-of-state customers. The Department of Revenue (Department) conducted an audit review of taxpayer's records and found that taxpayer had failed to collect sales tax on "a few truck sales . . . ." Accordingly, the Department issued a notice of Proposed Assessment for additional sales tax. Taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted during which taxpayer's representative explained the basis for the protest. This Letter of Findings results.

I. **Vehicle Sales** – Gross Retail Tax.

DISCUSSION

The issue is whether taxpayer should have collected sales tax on vehicles which were subsequently taken to out-of-state locations. Former IC § 6-2.5-5-15 stated that;

> Transactions involving motor vehicles, trailer, watercraft, and aircraft are exempt from the state gross retail tax if:
>
> > (1) upon receiving delivery of the motor vehicle, trailer, watercraft or aircraft, the person immediately transports it to a destination outside Indiana;

> (2) the motor vehicle, trailer, watercraft or aircraft is to be titled or registered for use in another state; and
>
> (3) the motor vehicle, trailer, watercraft, or aircraft is not to be titled or registered for use in Indiana. (*Repealed by P.L.81-2004, SEC.60*).

Taxpayer does not dispute the fact that former IC § 6-2.5-5-15 was repealed effective July 1, 2004. Taxpayer maintains, however, that he was unaware of the repeal.

In addition, taxpayer points to 45 IAC 2.2-5-21 which states;

> The state gross retail tax shall not apply to sales of motor vehicles, trailers, and aircrafts, delivered in Indiana for immediate transportation to a destination outside of Indiana and for licensing or registration for use in another state, and not to be licensed or registered in Indiana.

Taxpayer indicates that it was entitled to rely on the plain language of 45 IAC 2.2-5-21. Commissioner's Directive 25 (July 2004) addresses in part the taxpayer's issue;

> Effective July 1, 2004, IC 6-2.5-3-5 has been amended to delete the language that denied credit against Indiana use tax for sales and use tax paid to another state on the purchase of vehicles, watercraft or aircraft. Additionally, IC 6-2.5-5-15 has been repealed as of the same effective date. IC 6-2.5-5-15 allowed an exemption from sales and use tax on the purchase of motor vehicles, trailers, watercraft or aircraft to be taken out of state. Both of these provisions are contained in HEA 1365-2004.
>
> The repeal of IC 6-2.5-5-15 only affects situations where the purchaser takes possession of the vehicle prior to taking the vehicle out of state. This repeal does not affect out of state sales by Indiana dealers. *For a sale of a vehicle to be considered out of state, the purchaser must take possession via delivery outside of Indiana.* No exemption certificate is required when making an out of state sale. However, *the sales contract must specify that the vehicle is to be delivered out of state and the dealer must maintain shipping documentation to verify that the vehicle was delivered to the purchaser at a specific out of state location.* (*Emphasis added*).

The Department is prepared to accept taxpayer's assertion that it relied on the "delivered in Indiana" language contained within 45 IAC 2.2-5-21. However, the Department is unprepared to accept the premise that an apparently disharmonious regulation can stand in the Legislature's decision to repeal the underlying statutory authority. In *Hutchison v. State Bd. of Tax Comm'rs*¸520 N.E.2d 1281 (Ind. Tax Ct. 1988), the Tax Court considered agency regulations which were out of harmony with the underlying statute. "An administrative agency's regulations must fall within the scope of the agency's enabling legislation. The agency cannot enlarge or vary the power given by the legislature or create a rule out of harmony with the statute." *Id.* at 1283. *See also Subaru-Isuzu Auto., Inc. v. Ind. Dep't of State Revenue,* 782 N.E.2d 1071 (Ind.

Tax Ct. 2003) ("An administrative rule is a nullity where the provision upon which the rule is based has been repealed." *Id.* at 1076 n.8).

Taxpayer recognizes a sales tax exemption where the vehicle is delivered to the out-of-state customer. However, "For a sale of a vehicle to be considered out of state, the purchaser must take possession via delivery outside of Indiana." Commissioner's Directive 25 (July 2004). However, taxpayer was engaged in the sale of vehicles to out-of-state customers where the vehicles were delivered at taxpayer's location to the out-of-state customer.

The Department is not unsympathetic to taxpayer's dilemma. However, the Department is unable to abate the assessment on the ground that taxpayer was caught unaware of a change in the law.

FINDING

Taxpayer's protest is respectfully denied.

DK/JR/BK – November 9, 2007.